Supreme Court, U.S.
FILED
SEP 27 1999
OFFICE OF THE CLERK

(2)

No. 98-1989

In the
Supreme Court of the United States

DEBRA JEAN SHEPHERD,
Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

LINDA S. EADS
Deputy Attorney General for Litigation

GREGORY S. COLEMAN
Solicitor General
Counsel of Record

IDOLINA G. MCCULLOUGH
Assistant Solicitor General

Office of the Atty General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

ATTORNEYS FOR RESPONDENT

228

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Summary of the Argument 2

Argument 3

I. The Court of Appeals Correctly Decided That Summary Judgment Was Appropriate in This Hostile Work Environment Case. 3

II. The Court of Appeals Properly Evaluated Whether the Alleged Conduct Was "Severe or Pervasive" to Establish a Cause of Action. 9

III. The Court of Appeals Properly Found That Moore's Conduct Did Not Create a Hostile Work Environment. 15

Conclusion 18

TABLE OF AUTHORITIES

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 5, 7

Baskerville v. Culligan, 50 F.3d 428 (CA7 1995) 8

Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257 (1998) 6, 16

Carrero v. New York Hous. Auth., 890 F.2d 569 (CA2 1989) 12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) .. *passim*

Davis v. Monroe County Bd. of Educ., 119 S.Ct. 1661 (1999) 10

DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (CA5 1995) 10

Duffy v. Leading Edge Prods., Inc., 44 F.3d 308 (CA5 1995). 7

Ellison v. Brady, 924 F.2d 872 (CA9 1991) 12

Faragher v. Boca Raton, 118 S.Ct. 2275 (1998) . *passim*

Farpella-Crosby v. Horizon HealthCare, 97 F.3d 803 (CA5 1996) 10

Fuller v. Oakland, Cal., 47 F.3d 1522 (CA9 1995) 8

Gallagher v. Delaney, 139 F.3d 338 (CA2 1998) 9

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) . *passim*

Hathaway v. Runyon, 132 F.3d 1214 (CA8 1997) 8

Indest v. Freeman Decorating, Inc., 164 F.3d 258 (CA5 1999) 6, 10

King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533 (CA7 1990) 12

Konstantopoulous v. Westvaco Corp., 112 F.3d 710 (CA3 1997), *cert. denied*, 118 S.Ct. 1079 (1998) 8

Long v. Eastfield College, 88 F.3d 300 (CA5 1996) 16

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 5

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) ..... *passim*

Oncale v. Sundowner Offshore Serv., Inc., 118 S.Ct. 998 (1998) ..... *passim*

Rogers v. E.E.O.C., 454 F.2d 234 (CA5 1971)..... 12

Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871 (CA5 1999), *petition for cert. filed*, 67 U.S.L.W. 3773 (U.S. June 11, 1999) (No. 98-1989) ..... *passim*

Stacy v. Shoney's, Inc., 142 F.3d 436, 1998 WL 165139 (CA6 1998)(table) 8

Webb v. Baxter, 57 F.3d 1067, 1995 WL 352485 (CA4 1995)(table) 8

Weller v. Citation Oil & Gas Corp., 84 F.3d 191 (CA5 1996) 10

STATUTES

42 U.S.C. §2000e-2(a)(1). 2, 16

RULES

CTA4, Rule 36 8

CTA6, App. III, IOP 22. 8

FED. R. CIV. P. 56(c) 4

SUP. CT. R. 10(b), (c). 2

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 1047 (6th ed. 1991). 6

No. 98-1989

In the Supreme Court of the United States

DEBRA JEAN SHEPHERD,
Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the Comptroller of the State of Texas, submits this brief in opposition to Debra Jean Shepherd's petition for writ of certiorari. In her petition, Shepherd asks the Court to review the decision of the Fifth Circuit Court of Appeals, affirming the district court's grant of the Comptroller's motion for summary judgment. *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871 (CA5 1999), *petition for cert. filed*, 67 U.S.L.W. 3773 (U.S. June 11, 1999) (No. 98-1989). Specifically, Shepherd attacks the lower court's holding that "Moore's conduct did not render Shepherd's work environment objectively 'hostile' or 'abusive.'" *Shepherd*, 168 F.3d at 874; Pet. at 6.

SUMMARY OF THE ARGUMENT

Shepherd's lawsuit alleges a violation of 42 U.S.C. §2000e-2(a)(1). Shepherd proceeded on a hostile work environment theory. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986). In her petition, Shepherd contends that this Court's jurisprudence establishes that factual determinations regarding sexual harassment claims are entirely and exclusively within the province of a jury. Pet. at 7. Further, Shepherd contends that the Fifth Circuit's application of this Court's "severe or pervasive" standard is in conflict with other courts of appeals, as well as with this Court. Pet. at 15. The Court should deny Shepherd's petition because the court of appeals's decision does not conflict with relevant decisions of this Court or decisions of the United States courts of appeals. *See* SUP. CT. R. 10(b), (c).

This case does not merit review because the courts of appeals agree on the relevant governing legal principles. Indeed, the Fifth Circuit followed this Court's clearly established precedent in deciding this case. Moreover, Shepherd's attempt to fabricate a conflict in the circuits fails. Every case relied upon to support the alleged split follows the legal standards adopted by this Court regarding sexual harassment claims. Accordingly, certiorari should be denied.

Moreover, the court of appeals properly determined that Shepherd's allegations of sexual harassment were insufficient to defeat summary judgment under this Court's jurisprudence. To the extent that Shepherd argues that

summary judgment was improperly granted because only a jury may assess whether the facts as alleged constitute sexual harassment, her argument is without merit. Summary judgment is appropriate in a Title VII case when the nonmovant has failed to make a showing sufficient to establish the existence of an element essential to her case on which she bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Second, Shepherd did not establish that the conduct subjectively and objectively altered the conditions of her work environment. *Harris*, 510 U.S. at 22-23. For these reasons, the Fifth Circuit properly affirmed the district court's grant of summary judgment in the Comptroller's favor.

Further, the issues in this case involve only the application of established constitutional principles to the facts. The petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction. Accordingly, because there is no conflict between the court of appeals's decision and the relevant decisions of this Court concerning whether a Title VII violation occurred as an initial matter, Shepherd's petition should be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT SUMMARY JUDGMENT WAS APPROPRIATE IN THIS HOSTILE WORK ENVIRONMENT CASE.

Shepherd asks the Court to delineate the role of a jury in a hostile work environment suit. Pet. at 6. Shepherd contends that in *Meritor*, this Court indicated that juries should have the primary role in deciding such cases.

Id. Moreover, Shepherd contends the courts of appeals are split over whether judges or juries should determine whether a hostile work environment existed. Pet. at 9. Additionally, Shepherd argues that appellate courts are making factual determinations of whether the work environment was abusive or harassing. Pet. at 6.

Shepherd seems to argue that hostile work environment cases should not be decided on motion for summary judgment. To the extent that Shepherd's question is broader than the question raised below, the issue is not properly before the Court. Indeed, Shepherd argued on appeal that the district court erred in granting the Comptroller's motion for summary judgment. *Shepherd*, 168 F.3d at 873. The Fifth Circuit responded:

> [s]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'"

Shepherd, 168 F.3d at 873 (citing FED. R. CIV. P. 56(c); *Celotex*, 477 U.S. at 327). The Fifth Circuit's reasoning is sound. Rule 56(c) of the Federal Rules of Civil Procedure was drafted as an effective tool for screening cases that do not merit a trial. FED. R. CIV. P. 56(c) advisory committee's note (1937 Adoption).

In 1986, the Court decided a trilogy of cases that redefined the standards that govern motions for summary judgment and encouraged its use to dispose of appropriate

cases. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex*, *supra*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Together, these cases conclusively establish summary judgment as a viable tool for eliminating meritless claims prior to trial, and they support the district court's grant of summary judgment in this hostile work environment case.

This Court's jurisprudence establishes that summary judgment should be granted in appropriate cases. In fact, the Court has explicitly stated:

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Celotex, 477 U.S. at 323-24. Notably, the Court has not excluded hostile work environment cases from summary judgment review, and it should not. There is no legal reason to treat hostile work environment cases differently from other civil lawsuits. Judge Edith Hollan Jones recently commented:

> What constitutes an actionable claim for a sexual hostile working environment is a fact-sensitive determination, but the Supreme Court's decisions strongly suggest that such allegations are *not* invariably to be resolved by the jury. . . . Motions for judgment as a matter of law can police the baseline for hostile environment claims.

Indest v. Freeman Decorating, Inc., 164 F.3d 258, 264 n.8 (CA5 1999).[1] Judge Jones's analysis is legally sound.

Shepherd argues that the Court has indicated that the trier of fact ordinarily would resolve hostile environment claims. Pet. at 7-8 citing *Meritor* and *Oncale v. Sundowner Offshore Serv., Inc.*, 118 S.Ct. 998 (1998). But contrary to Shepherd's assertions, the Court has never intimated that summary judgment is inappropriate in Title VII cases. In fact, two of the Court's leading cases regarding hostile work environment claims were appeals from summary judgments. *Oncale*, 118 S.Ct. at 1001; *Burlington Indus., Inc., v. Ellerth*, 118 S.Ct. 2257 (1998).

In *Meritor*, the Court reviewed a Title VII claim that was decided after an 11-day bench trial, accordingly the judge was the trier of fact.[2] 477 U.S. at 60. Because the case went to trial, the Court acknowledged that its review of the fact finder's credibility determinations was limited. 477 U.S. at 68. The Court certainly did not hold that summary judgment was inappropriate in a hostile work environment case because the issue was not even before it.

---

1. Judge Jones wrote the opinion in which Justices Weiner and Furgeson concurred in judgment only, with Judge Weiner writing a separate concurring opinion.

2. In presenting her argument, Shepherd seems to use the term "trier of fact" to mean exclusively a jury. "Trier of fact" is more properly defined as either a jury or "the court when the court is trying an issue of fact other than one relating to the admissibility of evidence." BLACK'S LAW DICTIONARY 1047 (6th ed. 1991).

Also, Shepherd's reliance on *Oncale* to support her argument that the Court has observed that juries should resolve the issues in hostile work environment suits is unavailing. Pet. at 7-8. Again, the issue of whether summary judgment is inappropriate in these cases was not before the Court in *Oncale*. *Oncale* was based on the district court's grant of summary judgment based on its decision that Title VII did not authorize a cause of action for same-sex harassment. 118 S.Ct. at 1001. On appeal, the Fifth Circuit affirmed. The Court reversed the lower court's decision and held that same-sex discrimination may be prohibited by Title VII. *Id.* at 1001-02. Neither *Meritor* nor *Oncale* even suggests that summary judgment is inappropriate in hostile work environment cases.

The district court has the power to make the initial determination whether a plaintiff has produced sufficient evidence to defeat summary judgment. *Celotex*, 477 U.S. at 326; *Anderson*, 477 U.S. at 249. On appeal, the standard of review for a grant of summary judgment is *de novo*, and the appellate court will apply the same standards as the district court. *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (CA5 1995). Summary judgment must be affirmed unless the nonmoving party, who would bear the burden of proof at trial, can show a genuine issue of material fact as to each element of her claim. *Celotex*, 477 U.S. at 322-24; *Anderson*, 477 U.S. at 247-48. This rule allows summary judgment to eliminate frivolous claims and streamline employment discrimination litigation.

Shepherd attempts to expand the scope of the question presented to the Fifth Circuit (whether the district court properly granted summary judgment) into a different

inquiry (whether an appellate court should review mixed questions of law and fact *de novo*.).[3] Pet. at 8-9. This question regarding the appropriate standard of review is not before the Court. Because the proper standard of review in hostile work environment cases was not in dispute on appeal, the petition should be denied.

A review of the main cases Shepherd cites for the proposition that juries have the "central role" in resolving factual issues of sexual harassment cases belies her assertions of a circuit split. In *Hathaway v. Runyon*, 132 F.3d 1214, 1217 (CA8 1997), the Eighth Circuit reviewed whether a jury verdict was properly overturned. *Webb v. Baxter*, 57 F.3d 1067, 1995 WL 352485 (CA4 1995)(table), and *Stacy v. Shoney's, Inc.*, 142 F.3d 436, 1998 WL 165139 (CA6 1998)(table), are unpublished opinions and have no precedential value according to circuit rules. CTA4, Rule 36; CTA6, App. III, IOP 22. *Fuller v. Oakland, Cal.*, 47 F.3d 1522, 1525 (CA9 1995), is also a case involving a review of a bench trial, so whether summary judgment is appropriate in a hostile work environment case was not before the court. *Baskerville v. Culligan*, 50 F.3d 428 (CA7 1995), is also a review of a jury trial that does not contain any mention of the summary judgment question.

---

3. The passage Shepherd cites from *Konstantopoulous v. Westvaco Corp.*, 112 F.3d 710, 716 n.1 (CA3 1997), *cert. denied*, 118 S.Ct. 1079 (1998), states there is circuit split on what the standard of review is for mixed questions of fact and law, not whether summary judgment is appropriate in hostile work environment cases. Pet. at 9.

Only *Gallagher v. Delaney*, 139 F.3d 338 (CA2 1998), involves a review of a motion for summary judgment in a hostile work environment case. The court of appeals explicitly disagreed with the district court's findings and conclusions, stating that "[t]he factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment." *Id.* at 342. Yet, the court's holding was that summary judgment was not appropriate because there was a genuine issue of material fact. *Id.* ("The evidence, viewed in the light most favorable to the appellant, requires a trial."). Although the Second Circuit expressed some concerns about use of summary judgment in hostile work environment cases, it did not hold that summary judgment is never appropriate in Title VII cases. In sum, the cases cited by Shepherd fail to demonstrate a circuit split on the issue of whether summary judgment is inappropriate in hostile work environment cases. Because there is not a split of authority, the petition should be denied.

II. THE COURT OF APPEALS PROPERLY EVALUATED WHETHER THE ALLEGED CONDUCT WAS "SEVERE OR PERVASIVE" TO ESTABLISH A CAUSE OF ACTION.

Shepherd argues that the Fifth Circuit deviated from this Court's "severe or pervasive" standard in evaluating whether the alleged conduct established a cause of action based on a hostile work environment theory. Pet. at 14-15. Specifically, Shepherd argues this Court formulated the test in the disjunctive—"severe or pervasive"—and the Fifth Circuit applied the test in the conjunctive—"severe and pervasive." Pet. at 15. Shepherd's argument is a straw

man because the Fifth Circuit followed this Court's precedent in reviewing this case. *Shepherd*, 168 F.3d at 874 ("The Supreme Court explained in *Meritor* that, "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'").

Shepherd's conclusory statement that the difference between Title VII's standard and Title IX's is that Title IX requires proof that the harassment be both severe and pervasive, citing *Davis v. Monroe County Bd. of Educ.*, 119 S.Ct. 1661 (1999), is puzzling considering that *Davis* draws from *Meritor*, *Harris*, and *Oncale* in stating the type of behavior that would establish a cause of action for student-on-student sexual harassment. *Id.* at 1675. Similarly, Shepherd's allegation that the Fifth Circuit departed from this Court's standards in *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191 (CA5 1996), is unfounded. In *Weller*, the Fifth Circuit reviewed whether the evidence was sufficient to sustain the jury's verdict of a hostile work environment. 84 F.3d at 194. The court of appeals recited the appropriate elements to establish a cause of action as stated by this Court in *Meritor* and *Harris*. *Id.* In fact, the Fifth Circuit has consistently reiterated this Court's standards in reviewing hostile work environment cases. *Indest*, 164 F.3d at 263-64; *Farpella-Crosby v. Horizon HealthCare*, 97 F.3d 803, 806 (CA5 1996); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (CA5 1995). The Fifth Circuit has correctly applied the law as established by this Court in Shepherd's case as well as other decisions.

Shepherd's contention that the "severe or pervasive" test is one that the Court intended to apply disjunctively is incorrect. While it is true that an extremely single severe act may establish a Title VII violation for hostile work environment, the converse is not supported by the Court's precedent. *Faragher v. Boca Raton*, 118 S.Ct. 2275, 2283 (1998) ("isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'"). For example, a professional football player who complained that other football players swatted his buttocks with wet towels while in the locker room and he found the behavior created a hostile work environment could probably show the behavior was pervasive, but without more, he would not have a cause of action. The Court has stated:

> A professional football player's working environment is not severely or pervasively abusive, . . . if the coach smacks him on the buttocks as he heads onto the field.

Oncale, 118 S.Ct. at 1003. Thus, simply pervasive conduct without any severity cannot serve the basis for a hostile work environment claim.

In contrast, a single severe act could establish a cause of action. For example, a supervisor and an employee are on a business trip. The supervisor forces the employee to have a sexual interlude and promises to reward the employee at work. This example borders on a criminal act depending on the facts and a single incident could establish a cause of action. *See Meritor*, 477 U.S. 59-60. Some courts have determined that the "required

showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." *Ellison v. Brady*, 924 F.2d 872, 878 (CA9 1991)(citing *King v. Board of Regents of Univ. of Wis. Sys.*, 898 F.2d 533, 537 (CA7 1990); *Carrero v. New York Hous. Auth.*, 890 F.2d 569, 578 (CA2 1989)). This legal analysis finds support in the Court's jurisprudence.

The Court first established a cause of action for hostile work environment under Title VII in *Meritor*.[4] 477 U.S. at 66. *Meritor* established that to state a claim of hostile work environment under Title VII, the alleged conduct "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." 477 U.S. at 67. *Meritor* is instructive because the Court explained that not all harassment affects a "term, condition or privilege" of employment within the meaning of Title VII. The Court recognized that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not, by itself, actionable under Title VII. 477 U.S. at 67.

Seven years later, the Court revisited the hostile work environment issue in *Harris*. In *Harris*, the Court redefined conduct that is sufficiently "severe or pervasive" to establish a cause of action. The Court held that conduct that will support a cause of action begins in the middle of

---

4. Interestingly in deciding *Meritor* the Court looked to and drew from a Fifth Circuit opinion—*Rogers v. E.E.O.C.*, 454 F.2d 234 (CA5 1971). *See* 477 U.S. at 65-67.

the range with "merely offensive" at one end and conduct that causes a "tangible psychological injury" at the other end. *Harris*, 510 U.S. at 21. The Court explicitly stated "[t]his is not, and by its nature cannot be, a mathematically precise test." *Id.* at 22.

Instead, the Court fashioned a totality of the circumstances test for courts to use in evaluating the severity of the conduct and its pervasiveness. The test includes: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. *Harris*, 510 U.S. at 23. The Court stated that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at *all* the circumstances." *Id.* This statement severely undercuts Shephard's argument that a the Court meant for a finding of pervasiveness, alone, to establish a cause of action. Pet. at 14-15. Notably, the Court avoided establishing a bright line rule, but this is precisely the remedy Shepherd seeks from the Court. Pet. at 16.

Shepherd attempts to broaden the issue for review by arguing that the courts are in complete disagreement over the level of severity of conduct that is actionable under Title VII ranging from merely offensive to more egregious conduct. Pet. at 16-23. Shepherd's attempt to coax the Court into reviewing this broader issue must fail. Shepherd has not shown the existence of a clear circuit split on the issue.

Shepherd complains that the circuits are divided

over the type of conduct that supports a cause of action. Shepherd states that some circuits are disposing of cases as a matter of law because the alleged conduct is "less severe in content than the practices condemned in *Meritor*." Pet. at 16. Shepherd argues that these circuits have created a "safe harbor for employers." Pet. at 16. Shepherd's argument proves too much. The Court has explicitly stated:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII purview.

Harris, 510 U.S. at 21. The test created in *Harris* is susceptible to varying determinations of whether the allegations are sufficient to prove a hostile work environment existed.

In Shepherd's case, the Fifth Circuit applied the law as established by this Court. Shepherd contends that the Fifth Circuit's decision is erroneous because it found the alleged conduct was "pervasive," and she claims this finding alone is sufficient to establish a cause of action. Pet. at 15. Again, the record shows that the Fifth Circuit followed this Court's holding in *Harris* and stated:

> Even if the conduct occurred with some regularity over this time period we must also consider the other factors that contribute to whether an environment is hostile.

Shepherd, 168 F.3d at 874. The record shows that the Fifth

Circuit assumed for the sake of argument that Shepherd could prove a pattern of conduct but recognized that pervasiveness, alone, is insufficient to establish a cause of action. Moreover, the Fifth Circuit noted that the alleged conduct must be considered in light of the totality of the circumstances test fashioned by this Court in *Harris*. *Shepherd*, 168 F.3d at 874. The record explicitly contradicts Shepherd's arguments that the alleged conduct falls within Title VII protections.

Simply put, the severity of Moore's conduct was not sufficiently egregious to constitute a hostile work environment claim. The Fifth Circuit correctly labeled the comments made by Moore as "boorish and offensive." *Shepherd*, 168 F.3d at 874. Necessarily, the Fifth Circuit held "based on a consideration of all the circumstances, that Moore's conduct did not render Shepherd's work environment objectively 'hostile' or 'abusive.'" *Id.*

There can be no doubt that the court below applied the standard set out in *Meritor*, *Harris*, and *Faragher* in deciding the constitutional issues before it, and the only real point of contention is the adequacy of the court's findings that the alleged conduct was merely "boorish" and "offensive." The purely factual nature of Shepherd's argument dictates that the petition for writ of certiorari should be denied.

III. THE COURT OF APPEALS PROPERLY FOUND THAT MOORE'S CONDUCT DID NOT CREATE A HOSTILE WORK ENVIRONMENT.

Shepherd argues that court of appeals erred in deciding that "Moore's harassing actions, although

offensive, are not the type of extreme conduct that would prevent Shepherd from succeeding in the workplace." Pet. at 24. Contrary to Shepherd's assertions, the court of appeals correctly applied the governing legal principles.

The applicable provision of Title VII, on which Shepherd bases her claim, states:

> It shall be unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

42 U.S.C. §2000e-2(a)(1). To establish a claim for sexual harassment under this statute, the plaintiff must prove that (1) the subject conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to affect a "term, condition, or privilege" of employment; and (4) that the employer either knew or should have know of the harassment and failed to take prompt remedial action. *Harris*, 510 U.S. at 21-22; *Burlington Indus., Inc., v. Ellerth*, 118 S.Ct. 2257, 2270 (1998); *Long v. Eastfield College*, 88 F.3d 300, 309 (CA5 1996).

In *Harris*, the Court explicitly stated that not all offensive conduct is within Title VII's purview. 510 U.S. at 21. Logically, to establish a claim of hostile work environment, there must be actionable conduct that causes interference with the plaintiff's working conditions. Thus, there is a necessary relationship between the alleged conduct and the changed work conditions. In *Faragher*,

the Court stated this standard for establishing a hostile environment claim:

> We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the courts of appeals have heeded this view.

118 S.Ct. at 2284. The Fifth Circuit followed *Faragher* in deciding that "Moore's conduct did not render Shepherd's work environment objectively 'hostile' or 'abusive.'" *Shepherd*, 168 F.3d at 874.

In sum, there is simply insufficient evidence to support a finding that Shepherd's workplace was "permeated" with discriminatory conduct, such that the terms and conditions of her employment were altered. *Harris*, 510 U.S. at 21. Accordingly, the court of appeals correctly held that Moore's conduct did not render Shepherd's workplace objectively hostile or abusive. *Shepherd*, 168 F.3d at 874. For these reasons, the Court should deny the writ of certiorari.

CONCLUSION

For the reasons stated, Respondent respectfully requests that Shepherd's petition for writ of certiorari be denied.

Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

LINDA S. EADS
Deputy Attorney General
for Litigation

GREGORY S. COLEMAN
Solicitor General
Counsel of Record

IDOLINA GARCIA MCCULLOUGH
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR RESPONDENT

FILED
OCT 7 1999
OFFICE OF THE CLERK

No. 98-1989

In The

SUPREME COURT OF THE UNITED STATES

DEBRA JEAN SHEPHERD,
Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,
Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

PETER COSTEA
One Riverway
Suite 1700
Houston, TX 77056
(713) 840-6410

Counsel for Petitioner

No. 98-1989

In The

SUPREME COURT OF THE UNITED STATES

DEBRA JEAN SHEPHERD,

Petitioner,

v.

THE COMPTROLLER OF PUBLIC ACCOUNTS
OF THE STATE OF TEXAS,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY BRIEF

---

(1) The petition delineates the conflict that currently exists among the lower courts as to whether the existence of a hostile work environment is a question of law, a question of fact, or a mixed question of law and fact. One recent article described in terms similar to the petition the division among the circuits about this issue:

> Most courts assert . . . that the question of whether a given working environment was "hostile" for Title VII purposes is one of fact. Indeed, a few go so far as to say the question is "quintessentially" factual. Other courts conclude that, because the existence of a hostile work environment can be determined only with reference to a "reasonableness

> standard", that the issue cannot be classified as a pure question of fact. Within this group, however, some courts hold that a deferential review is appropriate, while others freely substitute their judgment for that of the trial court. Finally, at least one circuit court has concluded that . . . the question of whether a work environment is hostile is one of law to be reviewed de novo. In sum, *confusion reigns*.

S. Schneindlin & J. Elofson, "Judges, Juries and Sexual Harassment", 17 Yale L. & Pol'y Rev. 813, --- (1999)(footnotes omitted)(emphasis added).

Respondent studiously avoids taking any position whatever as to which of these differing lines of cases is correct. Respondent is also careful to avoid stating whether on its view the court of appeals in the instant case treated petitioner's hostile environment claim as presenting a legal or a factual issue. As a consequence, the Brief in Opposition is largely unresponsive to the central issue raised by the petition.

Respondent does repeatedly describe the decision of the Fifth Circuit--correctly in our view--as having made its own determination that the environment to which petitioner was subjected was not hostile. "The court of appeals properly *found* that Moore's conduct did not create a hostile work environment." (R.Br.Opp. 16)(Emphasis added). "[T]he court of appeals correctly *held* that Moore's conduct did not render Shepherd's workplace objectively hostile or abusive." (R.Br.Opp. 17)(Emphasis added). Respondent insists that arguments as to whether a hostile environment was created are disputes of a "purely factual nature" (R.Br.Opp. 16), but offers no explanation as to how an appellate court would have the authority to make its own findings resolving such factual disputes.

Other circuits continue to insist that whether harassment created a hostile work environment is essentially factual in nature, and thus generally to be left to the trier of fact. E.g. *O'Shea v. Yellow Technology Services, Inc.*, --- F. 3d ---, 1999 WL 547959 *3 (10th Cir. 1999)("the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is 'quintessentially a question of fact'"); *Richardson v. New York State Department of Correctional Service*, ---F. 3d ---, 1999 WL 391551 *6 (2d Cir. 1999)(the existence of a hostile environment is "a 'mixed question of law and fact' . . . . Such mixed questions are 'especially well suited for jury determination . . . .'")(Citations omitted).

(2) Respondent describes the first question presented by the petition as whether summary judgment can *never* be granted in hostile work environment case. (R.Br.Opp. 9). That, however, simply is not the question at all.

Summary judgment, upon an appropriate showing, is permissible regardless of whether the underlying issue is one of law or fact or a mixed question. For example, the issue in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), was a straightforward question of historical fact--whether the decedent had been exposed to asbestos. Although the decision in *Celotex* approved the use of summary judgment in the absence of any significant evidence in support of the plaintiff's factual claim, *Celotex* has never been understood to authorize an appellate court to make its own findings of fact on such a question.

Courts divided about whether any given issue is legal or factual in nature would always nonetheless readily agree that there were at least some cases in which summary judgment could be awarded. But they would, as here, utilize palpably conflicting standards in determining whether summary judgment should or should not be granted.

(3) With regard to the other, related questions raised by the petition, respondent's position also remains obscure. The petition noted, for example, that the lower courts are divided as to whether a hostile environment claim requires proof that the harassment was "severe." (Petition 14-24). The Brief in Opposition at various points appears to take three different positions: (a) The harassment must be severe, and "severe" denotes a particular level of egregiousness that is determined as a matter of law. (R.Br.Opp. 11,15). (b) Severity, like pervasiveness, is just one of several factors to be considered in deciding whether an environment is hostile. (R.Br.Opp. 13). (c) There is no specific legally fixed minimum level of severity; rather, severity and pervasiveness are questions of degree, and the existence of a hostile environment depends on the interplay of the two factors. (R.Br.Opp. 12). The conflicting positions in respondent's own brief mirror the differences among the circuits.

(4) Respondent understandably does not defend the Fifth Circuit's holding that sexual harassment is lawful unless it "destroys a protected classmember's opportunity to succeed in the workplace" (App. 6a), and does not deny that that requirement conflicts with the decisions of this Court and of numerous circuit courts.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

PETER COSTEA
One Riverway
Suite 1700
Houston, TX 77056
(713) 840-6410

Counsel for Petitioner